U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 10 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a physics and robotics teacher in Maryland. The petitioner has taught at the since 2011. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on January 10, 2012. The petition included a "narrative resume" apparently written by the petitioner, but phrased in the third person. The "narrative resume" described the petitioner as a "multi-talented kind of teacher" who "is active and service oriented." The document provided details about the petitioner's credentials and work history, but did not address the *NYSDOT* guidelines for the national interest waiver.

The petitioner submitted letters from administrators, teachers, and students who praised the petitioner's abilities and character, but did not indicate that the petitioner's work has had or will have a significant impact or influence outside of the school systems where he has taught.

Counsel stated that the initial submission included three "Awards and Recognitions . . . From Community Leaders." All three exhibits under that heading are letters from the mayor of [redacted] The letters are respectively dated early May of three consecutive years (2009-2011). In each letter, Mayor [redacted] reflected on the then-current school year, but never mentioned the petitioner specifically. Each letter is addressed to the petitioner, but on two of the letters his name is visibly out of alignment with the salutation "Dear." This anomaly, together with the lack of personalized content, indicates that the mayor's office issued annual "form" letters to multiple recipients within [redacted] public school system.

The petitioner received other "Awards and Recognitions" for accomplishments such as "Perfect Attendance" and completing training courses, at least some of which appear to be basic requirements for his position. These certificates establish the petitioner's professional competence and qualifications, but they do not distinguish him from other qualified teachers to the extent that the *NYSDOT* guidelines demand.

The director issued a request for evidence on May 23, 2012. The director instructed the petitioner to "submit evidence to establish that the beneficiary's past record justifies projections of future benefit to the nation." In response, the petitioner submitted background materials discussing the state of science education in the United States. These materials address the intrinsic merit of science education, but do not mention the petitioner specifically and therefore cannot show that he, individually, qualifies for a special benefit in the form of the national interest waiver.

In a personal statement, the petitioner discussed the overall importance of science education and indicated that he had obtained grant funding to support his school's robotics programs. The petitioner's ability to obtain such funding is not what is at issue in this proceeding. The petitioner cited numerous national-level challenges that face science education, but he provided no evidence that his work has had, or will continue to have, nationally significant results in those areas. Simply being a well-qualified science teacher is not grounds for the waiver.

Counsel, like the petitioner, cited national figures regarding science education to justify the waiver application. Counsel cited various federal initiatives aimed at reforming or improving public education, particularly the No Child Left Behind Act (NCLBA). One of the submitted supporting exhibits, a *Wall Street Journal* article entitled [redacted] quoted Dr. [redacted] executive director of the National Science Teachers Association, as stating: "The focus of the No Child Left Behind Act . . . has been on literacy and mathematics, and so we have a whole group of students not being adequately prepared for science careers."

Counsel stated that the Department of Labor, for labor certification purposes, holds that science teacher positions "require only a bachelor's degree, [and therefore] would not meet the objective of the employer to hire highly qualified teachers pursuant to No Child Left Behind." Section 9101(23) of the NCLBA defines the term "highly qualified teacher." One of the criteria for that designation is that the teacher "holds at least a bachelor's degree." Therefore, the wording of the statute does not

support counsel's implied claim that the NCLBA mandates the hiring of teachers with advanced degrees.

Counsel stated that the petitioner "has already been tested by the school and has proved his worth and effectiveness to the American special education students." There is, however, no blanket waiver for nonimmigrant workers who are currently employed in the United States.

The director denied the petition on November 20, 2012. The director quoted some of the witness letters and described other exhibits the petitioner had submitted, and concluded: "The petitioner's employment is limited to a local impact." The director found that the petitioner had not established eligibility under *NYSDOT*.

On appeal, counsel asserts that, by passing the NCLBA, "Congress has in effect engraved the missing definition upon the concept of 'in the national interest,' i.e., centered on the 'Best Interest of American School Children.'" Counsel asserts that, by defining the term "highly qualified teacher," "Congress also provided the means to achieve this now 'defined national interest.'" This assertion appears to run counter to previously submitted evidence, indicating that the NCLBA had not significantly improved science education in the decade following its passage.

Counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Counsel, above, highlighted the phrase "national educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the statute that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the No Child Left Behind Act, separately or in combination, create or imply any blanket waiver for teachers.

Counsel asserts that the purpose behind the NCLBA "is accomplished by, inter alia, 'closing the achievement gap[']' between high- and low-performing children." The petitioner submitted no evidence to show that his work has, in fact, closed or narrowed that gap at a nationally significant level. The assertion this goal "is ultimately implemented and promoted at the classroom level" does

not demonstrate or imply that every teacher's work produces national-level benefit; the effect is aggregate rather than individual.

Counsel states that the director "easily dismissed the [petitioner's] incomparable accomplishments," but the petitioner has not submitted evidence to establish that her achievements are "incomparable." Counsel then states:

> By requiring the petitioner to submit evidence on whether he, to a greater extent than U.S. workers having the same qualifications, plays a significant role in that field, is 'unduly burdensome' and in effect tantamount to requiring 'impossible evidence' since nobody has control over who and how her works are accessed and used.

The issue is not control over who uses the petitioner's work, but rather the absence of any evidence that anyone else uses it.

Counsel contends: "USCIS must make things possible rather than impossible in favor of the 'Best Interest of the School Children,' by granting waivers to 'Highly Qualified Teachers' who have already been serving the cause instead of requiring labor certification which in all likelihood would only reveal U.S. workers with minimum education qualification." Counsel cites no support for the interpretation of what "USCIS must" do, or for the claim that labor certification would "in all likelihood only reveal U.S. workers with minimum education qualification." Counsel has not shown that the statutory definition of a "highly qualified teacher" includes elements that an employer cannot permissibly include on a labor certification.

NYSDOT is a binding precedent decision. *See* 8 C.F.R. § 103.3(c). Counsel cites no statute, regulation, superseding precedent decision or court decision that retracts, annuls or modifies *NYSDOT* in a manner relevant to this proceeding. With respect to the requirement that the petitioner show wider influence on the field, there are various ways in which such influence is possible, such as development of a widely used curriculum or educational strategy. When a teacher's work is confined to his classroom, however, the impact of that work is strictly local, as acknowledged in *NYSDOT* at 217 n.3.

Counsel contends that "a single 'Highly Qualified Teacher' can inspire a national figure such as a President, a legislator, a member of the judiciary, a scientist, among others." The highly speculative assertion that one of the petitioner's students may one day rise to prominence is not a viable basis for a blanket waiver for teachers.

Counsel does not support the assertion that the NCLBA modified or superseded *NYSDOT*; that legislation did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95, 113 Stat. 1312 (1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the

waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not shown that the NCLBA indirectly implies a similar legislative change.

By statute, engaging in a profession (such as teaching) does not presumptively entitle such professionals to the national interest waiver. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. Furthermore, the petitioner has provided conflicting information that casts doubt on fundamental claims and indicates that she has left the occupation on which the waiver request rests. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.